United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-7343

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLARENCE O. GOKAY, JR., an infant by his mother, DOROTHY GOKAY, individually,

Plaintiff-Appellee,

- against -

MARC ANTHONY'S INC., d/b/a MARC ANTONIO'S RESTAURANT,

Defendant-Appellant.

Circuit Court
Docket No. 76-7343

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P/S

DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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To the Honorable Chief Judge Irving R. Kaufman, and Judges Henry J. Friendly and James L. Oakes of the United States Court of Appeals for the Second Circuit:

The appellant, Marc Anthony's Inc., respectfully prays that a rehearing en banc be granted to reconsider the decision and judgment of this Court rendered December 6, 1976. The grounds for rehearing are as follows:

I.

SINCE THIS CASE INVOLVES AN IMPORTANT QUESTION OF CONSTRUCTION OF PENNSYLVANIA LAW THIS COURT'S DECISION SHOULD NOT BE BY AN ORAL AFFIRMANCE THAT IS OF NO PRECEDENTIAL VALUE ESPECIALLY WHEN IT IS AT ODDS WITH EVERY OTHER REPORTED CASE RELATING TO THE IDENTICAL ISSUES.

This Court has stated that "in those cases in which decision is unanimous and each judge of the panel believes that no

jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order" (United States v. Joly, 493 F.2d 672 (2d Cir. 1974). That is simply not this case.

The instant case is of significant jurisprudential value involving as it did the construction of Pennsylvania's Workmen's Compensation Law as it related to illegally employed minors, which was a question of first impression in this Circuit. The affirmance is squarely at odds with every other reported case from the State of Pennsylvania itself and with the comprehensive opinion rendered by the Third Circuit in Schick v. Good Humor Corp., 438 F.2d 336 (3d Cir. 1971). Thus it is the type of case which requires more than an affirmance from the bench since the subject matter involves a critical interpretation and harmonization of various Pennsylvania statutes and the decision itself is contrary to the result reached in every other case in which similar issues were presented.

II.

THE DECISION OF THIS COURT, BASED AS IT WAS ON A SUA SPONTE FINDING THAT THE INFANT PLAINTIFF'S EMPLOYMENT WAS "CASUAL IN CHARACTER" NOT ONLY DEPRIVED DEFENDANT OF DUE PROCESS OF LAW BUT ALSO SELECTED AS A CONTROLLING ARGUMENT AN ISSUE THAT WAS NEVER PRESENTED TO THE JURY IN THE FORM OF A WRITTEN INTERROGATORY AND IN NO WAY FORMED PART OF THEIR VERDICT.

In submitting this case to the jury, the trial judge prepared three specific interrogatories for their consideration.

The first two dealt specifically with the status of the infant plaintiff while he was working at defendant's restaurant. The interrogatories called for specific findings that plaintiff was either an "employee" or was "permitted to work" at the restaurant. As such, the questions dealt specifically with the kinds of employees included within the coverage of §672 of the Pennsylvania Workmen's Compensation Law.

The jury was presented with only two possible categories in which to place the infant plaintiff.* Yet, this Court held that it would treat the verdict as if there had been a finding that plaintiff was in fact a member of a third class of employees not mentioned in the interrogatories which were answered by the jury. We submit that this should not have been done since it is not implicit in the jury's verdict that this issue was ever considered at all, let alone resolved in the manner now assumed by this Court.**

The issue of "casual employment" did not arise at trial, during summations, in the jury's verdict, or even in the briefs of either party: It was raised for the first time during oral argument in questions from the bench. Defendant was given no opportunity to adequately counter the argument developed by the

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*The improper charge on those categories formed the basis of the appeal.

**We note that during oral argument even Judge Friendly acknowleged that the questions propounded by the trial court did not include the matter now raised by this Court and that better interrogatories could have been fashioned.

Court sua sponte and which it obviously deemed controlling notwithstanding the uncontradicted authorities which dictated a contrary result.

Furthermore, during oral argument, this Court distinquished the case of Workmen's Compensation Appeal Board v. Piccolino, 341 A.2d 922 (Comm. Ct. Pa. 1975) on the ground that the decision arose in a different procedural context--it was an attempt to get Workmen's Compensation benefits. The fact remains, however, that in Piccolino a Pennsylvania court held that an infant working in almost exactly the same "informal" circumstances as the plaintiff in this case was a full "employee" entitled to Workmen's Compensation. As the infant in Piccolino was held to be an employee, we do not understand how the plaintiff herein can be deemed anything else, whether his employment be labelled casual or otherwise. The procedural setting of the case should not be permitted to make such a substantive difference in the result.

III.

THE COURT MISCONSTRUED THE LAW OF PENNSYLVANIA WHICH UNEQUIVOCALLY RELEGATED THE PLAINTIFF TO WHATEVER REMEDIES HE HAD UNDER WORKMEN'S COMPENSATION.

In addition to all of the cases decided by the courts of Pennsylvania which are not in harmony with the decision in this case, is the decision in Schick v. Good Humor Corp. 438 F.2d 336 (3d Cir. 1971) in which the Third Circuit, which

is of course very familiar with Pennsylvania Law, stated:

> "However unsettled Pennsylvania case law may once have been, the Pennsylvania Supreme Court's decision in Evans v. Allentown Portland Cement Co., 433 Pa. 595 A.2d 646 (1969), now leaves no doubt about the disposition required in this diversity action. Evans explicitly declared that the cases upon which plaintiff here relies, Lincoln v. National Tube Co., 268 Pa. 504, 112 A. 73 (1920) and King v. Darlington B.& M. Co., 284 Pa. 277, 131 A.241 (1925), 'were laid to rest by [1931, 1929, and 1945] amendments to the Workmen's Compensation Act and our cases of Fritsch v. Pennsylvania Golf Club, 355 Pa. 384, 50 A.2d 207 (1947), and Lengyel v. Bohrer, 372 Pa. 531, 94 A.2d 753 (1953).' 252 A.2d at 647. Although plaintiff contends that a minor may not be bound by the provisions of the Workmen's Compensation Act if his injuries occurred during a violation by the employer of a statutory or regulatory obligation, Evans specifically rejected this argument:
>
> The amendment of 1945 provided that if minors, like adults, did not elect not to be bound by these workmen's compensation provisions, they would be so bound and waived all other rights of action. Fritsch v. Pennsylvania Golf Club, supra, and Lengyel v. Bohrer, supra, quite properly interpreted the effect of these amendments as prohibiting an action at law by an illegally employed minor, in the absence of a rejection of the Workmen's Compensation Act by either the minor or the emplcyer. The obvious intent of the amendments was to give the minor a quid pro quo in the form of additional compensation but prohibit any common law action.
>
> Tge minor is thus treated just like the adult, with the exception of the additional amount recoverable. With regard to adults, we have often held, most recently in Hyzy v. Pittsburgh Coal Co., 384 Pa. 316, 121 A.2d 85 (1956), that even where neglect of a statutory duty is alleged, the employee's only remedy is under the Workmen's Compensation Act.

Id. at 647-648.

> "Plaintiff has not rejected Workmen's Compensation coverage. Indeed, he pursued the remedies provided for under the Act and presently is engaged in state litigation over the amount of weekly compensation due the estate.
>
> "The judgment of the district court will be reversed and the cause remanded with directions to enter judgment notwithstanding the verdict for defendant-appellant."

Wherefore it is respectfully submitted that this petition for a rehearing en banc be granted.

Dated: December 20, 1976

Respectfully submitted,

BOWER & GARDNER

By Clifford A. Bartlett, Jr.

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STEVEN Di JOSEPH
CLIFFORD A. BARTLETT, JR.
Of counsel

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK:) ss.

Jill Di Joseph being duly sworn, deposes and says, that deponent is not a party to the action, is o[illegible]'8 years of age and resides at 155 West 68th Stre[illegible]ew York, N.Y. 10023
That on the 20th day of December , 19 76 deponent served the within PETITION FOR REHEARING EN BANC (3 Copies)

upon

Lipsig, Napoli, Sullivan, Mollen & Liapakis, Esqs.,
Attorneys for Plaintiff-Appellee
100 Church Street
New York, N.Y. 10007

attorneys in this action, at the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Jill Di Joseph
Jill Di Joseph

Sworn to before me this
20th day of December , 19 76.

STEVEN DI JOSEPH
Notary Public, State of New York
No. 24-4518576
Qualified in Kings County
Commission Expires March 30, 19[illegible]